TAN WENG CHIANG

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
PEH SWEE CHIN SCJ
EDGAR JOSEPH JR SCJ
[SUPREME COURT CRIMINAL APPEAL NO. 48 OF 1987]
15 OCTOBER 1992

CRIMINAL PROCEDURE: *High Court convicted and sentenced appellant to death on two charges under s. 57(1) Internal Security Act 1960 - Two grounds of appeal against conviction and sentence - Joint trial - Whether High Court trial was a nullity - Discretion under s. 170 Criminal Procedure Code - Joint trial - Whether it was a pre-requisite for the Court to decide whether or not a joint trial ought to have been ordered at the commencement of trial - Regulation 10(2) of Essential (Security Cases) Regulations 1975 - Whether exercise of discretion to order joint trial under s. 170 Criminal Procedure Code occasioned substantial miscarriage of justice as envisaged by proviso to s. 60 of Courts of Judicature Act 1964.*

STATUTORY INTERPRETATION: *Golden rule - Construction of reg. 10(2) - Plain and ordinary meaning - Effect of reg. 10(2) on s. 170 of Criminal Procedure Code - Whether reg. 10(2) had varied and excluded s. 170 Criminal Procedure Code.*

At a joint trial of the appellant and one Lim Ah Wang, the appellant was convicted and sentenced to death on two charges, *viz:*

(a) unlawful possession of a gun under s. 57(1)(a) of the Internal Security Act 1960 ("ISA")

(b) unlawful possession of 33 rounds of ammunition under s. 57(1)(b) of the Act.

Lim Ah Wang, who was charged under s. 58(2) of the Act for consorting with the appellant was found not guilty and acquitted without his defence being called.

The appellant appealed against the sentence and conviction on the grounds that:

(a) The trial before the trial Court of both the appellant and Lim Ah Wang was a nullity as no application was made by the prosecution for a joint trial. The learned Judge was wrong in law in not having exercised his discretionary power under s. 170 of the Criminal Procedure Code ("CPC") in determining whether the charges against the appellant and Lim Ah Wang ought to be tried jointly or separately. It was a pre-requisite for the Court to decide whether or not a joint trial ought to be ordered at the commencement of the trial.

(b) As the public prosecutor had not issued a certificate under reg. 10(2) of the Essential (Security Cases) Regulations 1975 for a joint trial, the trial Court had no jurisdiction to order a joint trial as s. 170 of the CPCode had been varied and excluded by the reg. 10(2) which read:

> Any number of accused persons may be tried together and they shall be tried together where the public prosecutor gives a certificate that it is a fit case for a joint trial.

Held:

[1] The record and supplementary record of appeal showed that when the appellant and Lim Ah Wang appeared before the High Court with Counsel on 23 March 1986, an application was indeed made by the learned DPP for a joint trial of both and the application was allowed and there was no objection by the defence.

[2] There was no reason why the appellant and Lim Ah Wang should not have been tried jointly under s. 170 of CPC as Lim Ah Wang was charged with consorting with the appellant under s. 58(2) of ISA 1960 which was committed in the same transaction on 22 September 1984 with regard to the possession of firearm and ammunition.

[3] Although s. 163 CPC provides that each accused person should be charged and tried separately and a contravention of the rule, according to the Privy Council in *Subramaniam Ayyer v. King Emperor* and followed by *Chin Chong v. PP*, is an illegality which cannot be cured, the section itself sets out four exceptions to the rule as provided in ss. 164, 165, 166 and 170 CPC. In the circumstances, there was no merit in the argument that there was no application made by the prosecution for a joint trial.

[4] Applying the golden rule of construction as to the plain and ordinary meaning of the words used by the legislature in reg. 10(2) it is clear that the word "and" was intended to be read disjunctively. The signification of the words "Any number of accused persons may be tried together" in the first limb of reg. 10(2) were held to grant the Court a discretion in exercising the power under s. 170 CPC to order a joint trial. The second limb of reg. 10(2) took away the Court's power to refuse an application for a joint trial under s. 170 CPC in situation where the public prosecutor issued a certificate for joint trial and the Court was obliged to hold a joint trial notwithstanding that the case might not fall under s. 170 CPC. Therefore, the reg. 10(2) preserved the discretionary power and jurisdiction to order a joint trial conferred by s. 170 CPC.

[5] In the circumstances, the decision of the trial Judge to order a joint trial was not a nullity and there were no evidence to show that the trial Judge's exercise of discretion occasioned substantial miscarriage of justice as envisaged by the proviso to s. 60 of the Courts of Judicature Act 1964.

[Appeal dismissed. Conviction on both charges upheld and death sentence affirmed.]

[**Bahasa Malaysia** Translation of Headnote]

PROSEDUR JENAYAH: *Mahkamah Tinggi telah menyabitkan kesalahan dan menjatuhkan hukuman mati terhadap perayu atas dua tuduhan di bawah s. 57(1) Akta Keselamatan Dalam Negeri 1960 - Dua alasan rayuan terhadap kesabitan kesalahan dan hukuman - Perbicaraan bersama - Samada perbicaraan Mahkamah Tinggi dibatal - Samada Hakim tersilap dari segi undang-undang dalam tidak mengamalkan budibicaranya di bawah s. 170 Kanun Prosedur Jenayah (KPJ) - Perbicaraan bersama - Samada menjadi prasyarat bagi Mahkamah untuk memutuskan samada atau tidak suatu perbicaraan bersama harus diperintahkan pada permulaan perbicaraan - Peraturan 10(2) Peraturan-peraturan (Kes-kes Keselamatan) Perlu 1975 - Samada amalan budibicara dalam memerintahkan perbicaraan bersama di bawah s. 170 KPJ membawa kepada salah laksana keadilan di bawah proviso kepada s. 60 Akta Mahkamah Kehakiman 1964.*

PENTAFSIRAN STATUT: *Rukun keemasan - Pentafsiran peraturan 10(2) - Maksud biasa dan jelas - Kesan peraturan 10(2) ke atas s. 170 KPJ - Samada Peraturan 10(2) telah mengubah dan mengetepikan s. 170 KPJ.*

Dalam perbicaraan bersama perayu dan Lim Ah Wang, perayu telah disabitkan kesalahan dan dijatuhkan hukuman mati atas dua pertuduhan, yakin:

(a) pemilikan senjata api tanpa kebenaran di bawah s. 57(1)(a) Akta Keselamatan Dalam Negeri 1960 ("AKDN")

(b) pemilikan 33 butir amunisi tanpa kebenaran di bawah s. 57(1)(b) Akta tersebut.

Lim Ah Wang, yang dipertuduhkan di bawah s. 58(2) Akta tersebut kerana berdamping dengan perayu didapati tidak bersalah dan dibebaskan tanpa memanggil pembelaanya.

Perayu telah merayu terhadap hukuman dan kesabitan kesalahannya atas alasan-alasan bahawa:

(a) Perbicaraan kedua-dua perayu dan Lim Ah Wang di hadapan Mahkamah perbicaraan adalah tidak sah, memandangkan tiada ada permohonan yang dibuat oleh pihak pendakwa untuk mengadakan suatu perbicaraan bersama. Hakim yang arif tersebut telah tersilap dari segi undang-undang dalam tidak mengamalkan kuasa budibicaranya di bawah s. 170 Kanun Prosedur Jenayah ("KPJ") bila ia gagal memutuskan sama ada pertuduhan-pertuduhan terhadap perayu dan Lim Ah Wang harus dibicarakan secara bersama atau berasingan. Adalah menjadi prasyarat bagi Mahkamah untuk memutuskan sama ada atau tidak suatu perbicaraan bersama harus diperintahkan pada permulaan perbicaraan.

(b) Memandangkan pendakwa raya tidak mengeluarkan suatu sijil di bawah peraturan s. 10(2), Peraturan-peraturan (Kes-kes Keselamatan) Perlu 1975 bagi tujuan mengadakan perbicaraan bersama, Mahkamah perbicaraan tidak mempunyai sebarang bidang kuasa untuk memerintahkan suatu perbicaraan bersama oleh kerana s. 170 KPJ telah diubah dan diketepikan oleh peraturan 10(2) yang menyebut seperti berikut:

> Sebarang bilangan orang-orang tertuduh boleh dibicarakan bersama dan mereka hendaklah dibicarakan bersama-sama apabila pendakwaraya memberikan suatu sijil bahawa ianya adalah suatu kes yang layak untuk perbicaraan bersama.

Diputuskan:

[1] Rekod rayuan dan rekod rayuan tambahan menunjukkan bahawa apabila perayu dan Lim Ah Wang hadir di hadapan Mahkamah Tinggi bersama Peguam pada 23 Mac 1986, timbalan pendakwaraya yang bijaksana itu memang telah membuat suatu permohonan bagi perbicaraan bersama akan kedua-dua perayu dan Lim Ah Wang dan permohonan tersebut telah dibenarkan dan tiada sebarang bantahan dibuat oleh pihak pembela.

[2] Tiada sebab mengapa perayu dan Lim Ah Wang tidak harus dibicarakan bersama di bawah s. 170 KPJ memandangkan Lim Ah Wang telah dituduh berdamping dengan perayu di bawah s. 58(2) AKDN 1960 yang telah dilakukan dalam transaksi yang sama pada 22 September 1984 berhubung dengan pemilikan senjata api dan amunisi.

[3] Walaupun s. 163 KPJ memperuntukkan bahawa setiap orang tertuduh haruslah dipertuduh dan dibicarakan secara berasingan dan suatu pelanggaran peruntukan tersebut menurut Majlis Privy dalam *Subramaniam Ayyer v. King Emperor* yang telah diikuti dalam *Chin Chong v. PP*, adalah satu ketaksahan yang tidak dapat diperbaiki, seksyen tersebut ada menyebut empat kecualian iaitu ss. 164, 165, 166 dan 170 KPJ.

[4] Apabila rukun pentafsiran keemasan dipakai bagi mentafsir maksud jelas dan biasa perkataan-perkataan yang terdapat dalam peraturan 10(2), adalah jelas bahawa perkataan "dan" (and) dalam peraturan 10(2) membawa kepada maksud disjunktif. Maksud perkataan "sebarang bilangan orang-orang tertuduh boleh dibicarakan bersama" dalam bahagian pertama peraturan

10(2) telah diputuskan sebagai memberikan Mahkamah budibicara di bawah s. 170 untuk memutus sama ada orang-orang tertuduh harus dibicarakan bersama-sama atau berasingan. Bahagian kedua peraturan 10(2) telah membatalkan kuasa Mahkamah menolak permohonan pendakwa raya untuk mengadakan perbicaraan bersama di bawah s. 170 KPJ apabila pendakwaraya telah mengeluarkan sijil untuk mengadakan perbicaraan bersama sekalipun kes tersebut tidak jatuh di bawah s. 170 KPJ.

[5] Dalam hal ini, keputusan Hakim perbicaraan memerintahkan perbicaraan bersama bukan merupakan suatu pembatalan dan tiada bukti yang menunjukkan bahawa amalan budibicara oleh Hakim perbicaraan telah menimbulkan salah laksana keadilan sebagaimana disebut oleh proviso kepada s. 60 Akta Mahkamah Tinggi 1964.

[Rayuan ditolak. Kesabitan kesalahan terhadap kedua-dua tuduhan dikekalkan dan hukuman mati yang dijatuhkan itu disahkan.]

Cases referred to:
Subramaniam Ayyar v. King-Emperor 28 IA 257 ***(refd)***
Chin Choy v. PP [1955] MLJ 237 ***(refd)***
Jayaraman & Ors. v. PP [1979] 2 MLJ 88 ***(refd)***
Manson v. Duke of Westminster & Ors. [1981] 2 All ER 40 ***(refd)***
River Wear Comrs. v. Adamson [1874-80] All ER Rep 1 ***(refd)***
Duport Steels Ltd. v. Sirs [1980] 1 All ER 529 ***(refd)***
Affin Credit Malaysia Sdn. Bhd. v. Yap Yuen Fui [1984] 1 CLJ (Rep) 62 ***(refd)***
Magor and St. Mellons Rural District Council v. Newport Corporation [1952] AC 189 ***(refd)***
Lim Sing Hiaw v. PP [1965] 31 MLJ 85 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 163, 164, 165, 166, 170
Essential (Security Cases) Regulations 1975, Reg. 3(1), 6(1), 10(2)
Internal Security Act 1960, ss. 57(1), 57(1)(a), (b), 58(2)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Jalaldin bin Hussain, DPP

JUDGMENT

Mohd. Azmi SCJ:

At a joint trial of the appellant and one Lim Ah Wang, the appellant was convicted by Abdul Malek J on two counts under s. 57(1) of the Internal Security Act 1960 (revised 1972), in the Kota Bharu High Court and sentenced to death. On the first charge he was found guilty of being in possession without lawful authority, of a .22 pistol No. 94776 in a security area at a police road block along the Rantau Panjang-Pasir Mas Highway on 22 September 1984 at about 12.30 p.m., an offence punishable under s. 57(1)(a).

On the second charge, he was found guilty under s. 57(1)(b) of being in possession of thirty-three rounds of 22 ammunition without lawful authority at the same time and place. The pistol was found tucked in the front part of his trousers loaded with nine rounds of ammunition. Another 24 rounds of ammunition were found in a polythene bag in his right hand trousers' pocket. However, Lim Ah Wang who was charged under s. 58(2) for consorting with the appellant in the circumstances which raised a reasonable presumption that he knew that the appellant was in unlawful possession of the firearm and ammunition, was found not guilty and acquitted at the close of the prosecution case without his defence being called, there being hardly any evidence against him apart from the mere fact that he was found travelling in the same taxi as the appellant together with three other passengers.

There was ample evidence to prove that at the time of the commission of the two offences, the appellant was travelling in a motor taxi driven by Che Daud bin Yusuf (PW5) from the direction of the border town of Rantau Panjang towards Pasir Mas. He was seated in front, next to the driver. There were four other passengers in the rear seat including Lim Ah Wang. The discovery of the firearm and ammunition on the person of the appellant was proved by the testimony of police witnesses and sufficiently corroborated by the evidence of the taxi driver, an independent witness. In his defence, the appellant contended that he was framed up by the police and he denied possession of the firearm and the ammunition. On the evidence before him, the learned Judge came to the conclusion that the defence had not raised a reasonable doubt in the prosecution case and found him guilty on both the charges.

Before us, since the appellant was practically caught red handed with the firearm and ammunition, the only point raised by Mr. Karpal Singh on behalf of the appellant was that the trial before the learned Judge was a nullity, as no application was made by the prosecution for a joint trial of both the appellant (in Criminal Trial No. 14 of 1984) and Lim Ah Wang (in Criminal Trial No. 15 of 1984). It was contended that the learned trial Judge was wrong in law in not exercising his discretionary power in accordance with s. 170 of the Criminal Procedure Code for the purpose of determining whether the charges against the appellant and Lim Ah Wang ought to be tried jointly or separately. Mr. Karpal Singh argued that it was a pre-requisite for the Court to decide whether or not a joint trial ought to be ordered at the commencement of the trial. Secondly, it was contended that without a certificate of the public prosecutor issued under reg. 10(2) of the Essential (Security Cases) Regulations 1975, the trial Court had no jurisdiction to order a joint trial.

On the first issue raised, we were satisfied from the record and supplementary record of appeal that when the appellant and Lim appeared before the High Court with Counsel on 23 March 1986, an application was indeed made by DPP Mohd. Azman bin Husin for a joint trial of both the accused persons. The application was allowed and there was nothing in the appeal record to indicate that any objection to the joint trial had been raised by the defence either on that day or on any subsequent day of the trial. Since Lim Ah Wang was charged with the offence of consorting with the appellant under s. 58(2) of the Internal Security Act with regard to unlawful possession of firearm and ammunition committed in the same transaction, we found no reason why the two accused should not be tried jointly under s. 170 of the Criminal Procedure Code. Although s. 163 CPC provides that each accused person should be charged and tried separately, and a contravention of this rule according to the Privy Council in *Subramaniam Ayyar v. King-Emperor* 28 IA 257 and followed by *Chin Choy v. PP* [1955] MLJ 237 and *Jayaraman & Ors. v. PP* [1979] 2 MLJ 88 is an illegality which cannot be cured, the section itself sets out four exceptions to the rule as provided in ss. 164, 165, 166 and 170. In the circumstances, we were satisfied that there was no merit in the argument that there was no application made by the prosecution for a joint trial. Since Lim Ah Wang was charged with the offence of consorting with the appellant, the fact that the original charge against the appellant was rectified by amendment from "February" to "September" 1984 (due no doubt to typographical error) after two prosecution witnesses had given evidence, did not detract from the undisputed fact that the offences allegedly committed by both accused had taken place in the same transaction on 22 September 1984. The error in the original charge was quite obvious because even the certificate issued by the public prosecutor under reg. 6(1) for committal of the appellant in the High Court referred to offences committed on 22 September 1984.

On the second argument, reg. 3(1) of the Essential (Security Cases) Regulations 1975 provides:

> These Regulations shall have effect with respect to security cases notwithstanding anything to the contrary contained in any written law; but, except in so far as the same are varied by these Regulations, the ordinary practice and procedure, where appropriate, shall apply to security cases.

Mr. Karpal Singh sought to show that s. 170 of CPC had been varied and excluded by reg. 10(2) which states:

> Any number of accused persons may be tried together, and they shall be tried together where the public prosecutor gives a certificate that it is a fit case for a joint trial.

In *Manson v. Duke of Westminster & Ors.* [1981] 2 All ER 40, Stephenson LJ reproduced at p. 48 Lord Wensleydale's golden rule of interpretation of statute cited by Lord Blackburn in *River Wear Comrs. v. Adamson* [1874-80] All ER Rep 1 at 12:

> ... that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear...

Applying the golden rule of construction as to the plain and ordinary meaning of the words used by the legislature in reg. 10(2), it is clear that the word "and" is intended to be read disjunctively. The signification of the words "Any number of accused persons may be tried together" in the first limb of the reg. 10(2) is a discretion given to the Court to exercise the power given under s. 170 CPC for a joint trial, but the second limb of the Regulation takes away the Court's power to refuse an application for a joint trial under the CPC where the public prosecutor gives a certificate in which case the Court is obliged to hold a joint trial of the several accused persons notwithstanding that the case might not fall under s. 170 CPC. In our view, full effect must be given to the words in the first limb of the Regulation. We cannot accept that the intention of the legislature is to displace completely the provision of s. 170 CPC in all cases unless we are prepared to do violence to the legislative words or to ignore these words altogether so as to produce the interpretation canvassed by the learned defence Counsel. Where the meaning of words in the statute is plain and unambiguous, Judges should not invent fancy ambiguities. This principle though enunciated by Lord Diplock in *Duport Steels Ltd. v. Sirs* [1980] 1 All ER 529 at 541 in legislation involving industrial relation, is in our view equally appropriate, subject to the golden rule, in legislation made under emergency power to curtail or modify existing legislation on the power and jurisdiction of the Court in criminal law and procedure. Clear and unambiguous words must exist in such modification or exclusion of the existing powers and jurisdiction of the Court. In interpreting reg. 10(2), the duty of the Court is therefore limited to interpreting the words used by the legislature. The same principle was adopted by the Federal Court in *Affin Credit Malaysia Sdn. Bhd. v. Yap Yuen Fui* [1984] 1 CLJ (Rep) 62 at 65 quoting with approval *Magor and St. Mellons Rural District Council v. Newport Corpn.* [1952] AC 189, 191.

In the present case, not only is there absence of expressed words in reg. 10(2) to exclude wholly the provision of s. 170 CPC, but words do exist to signify the intention of the legislature to preserve the discretionary power of the Court to allow an application for a joint trial even where there is no certificate for a joint trial issued by the public prosecutor. In our opinion, the modification intended by the reg. 10(2) is only applicable to cases where there is such a certificate by the public prosecutor in which event the Court has no discretion

but to grant the order for a joint trial notwithstanding that the case is not covered by s. 170 CPC. The modification is only intended to ensure that the application for a joint trial by the prosecution will under no circumstances be refused on whatever grounds once the certificate is produced. However, where there is no certificate, the power and jurisdiction of the Court under s. 170 CPC to allow or refuse such an order, remain intact in the absence of expressed and unambiguous words to the contrary.

In the appeal before us there was admittedly no certificate issued by the public prosecutor under reg. 10(2). The absence of such certificate did not deprive the trial Judge of the discretionary power and jurisdiction to order a joint trial conferred by s. 170 CPC. In the circumstances we were not persuaded that the joint trial in this case was a nullity. We had also examined the propriety of the discretion which had been exercised by the learned Judge. Following the principle enunciated by the Federal Court in *Lim Sing Hiaw v. PP* [1965] 31 MLJ 85, we found that the learned Counsel for the appellant had failed to show us and nor were we able to discover ourselves in what way the joint trial in this particular case had occasioned substantial miscarriage of justice as envisaged by the proviso to s. 60 of the Courts of Judicature Act 1964.

The appeal was accordingly dismissed. The conviction on both the charges was upheld and the mandatory death sentence was affirmed.

Also found at [1992] 4 CLJ 2094